

“The 2003 Ordinance Deadline”

What does it mean and how does it affect you?

The State Planning Office (SPO) Land Use Team and Regional Councils have been fielding calls from concerned citizens, planners, and local officials regarding the upcoming legislative deadline that affects zoning, rate of growth, and impact fee ordinances. Some commonly asked questions (with responses) below should help clarify our interpretation of the law.

While this document has been developed to assist our constituents in understanding the law and its basic interpretation, members of the SPO Land Use Team are not attorneys. If you have a specific question about the legal interpretation of this law or the impact of this law in your town, we suggest you consult a land use attorney directly. It is up to each town to gauge the risk of challenge it faces under this statute and choose a course of action; a land use attorney can assist you in that decision-making process. If you have *general* questions or concerns about the law that are not addressed here, please contact SPO or your Regional Council.

Overview

A municipality is subject to the law concerning the 2003 deadline (30-A MRSA, section 4314(3)) if it has the following types of ordinances:

- zoning (other than mandatory shoreland zoning);
- rate of growth (also known as a building cap or growth cap); or
- impact fee.

The law says that all or portions of these ordinances are subject to being declared invalid by a court after January 1, 2003 (or later if one of three extensions apply) unless the court finds that:

- the municipality has a “comprehensive plan adopted under the subchapter”, and
- the challenged ordinance (or portion thereof) is consistent with the plan.

A municipality that has the types of ordinances subject to this law should seek the advice of its attorney regarding the likelihood that all or portions of the ordinances would be declared invalid under 30-A MRSA section 4314(3) if challenged in court.

Frequently Asked Questions

- 1) What is the law in question?
- 2) To which types of ordinances does the law apply?
- 3) Under what circumstances will my town’s ordinances continue to be valid?
- 4) What do you mean, “a comprehensive plan adopted under this subchapter?”
- 5) If my town does not have a plan that SPO has found consistent, will the local zoning, rate of growth, and impact fee ordinances be voided on January 1, 2003?
- 6) My town’s plan was found inconsistent by SPO after we adopted a zoning ordinance. What happens now?
- 7) I don’t know if my ordinances are “consistent.” What does that mean?
- 8) If the ordinance in question is not consistent with a consistent plan, is the whole ordinance thrown out?

- 9) My town doesn't have zoning (other than mandatory shoreland zoning), rate of growth, or impact fees ordinances - does the January 1, 2003 deadline affect my town's other ordinances?
- 10) Are there any extensions to the January 1, 2003 deadline?
- 11) What is the best course of action if my town attorney believes that my town's zoning (other than mandatory shoreland zoning), rate of growth or impact fee ordinances are in danger of being declared invalid by a court, either because my town's comprehensive plan is inconsistent with the Act or because the ordinances are inconsistent with my town's consistent plan?

1. What is the law in question?

Title 30-A, §4314(3) reads:

“Rate of growth, zoning and impact fee ordinances. After January 1, 2003, any portion of a municipality's rate of growth, zoning or impact fee ordinance must be consistent with a comprehensive plan adopted under this subchapter. The portion of a rate of growth, zoning or impact fee ordinance that is not consistent with a comprehensive plan is no longer in effect unless:

- <A. and B. were repealed>
- C. The ordinance or portion of the ordinance is exempted under subsection 2 (mandatory shoreland zoning ordinances);
- D. The municipality is under contract with the office to prepare a comprehensive plan or implementation program, in which case the ordinance or portion of the ordinance remains valid for up to 4 years after receipt of the first installment of its first planning assistance grant or for up to 2 years after receipt of the first installment of its first implementation assistance grant, whichever is earlier;
- E. The ordinance or portion of the ordinance conflicts with a newly adopted comprehensive plan or plan amendment adopted under this subchapter, in which case the ordinance or portion of the ordinance remains in effect for a period of up to 24 months immediately following adoption of the comprehensive plan or plan amendment; or
- F. The municipality applied for and was denied financial assistance for its first planning assistance or implementation assistance grant under this subchapter due to lack of state funds on or before January 1, 2003. If the office subsequently offers the municipality its first planning assistance or implementation assistance grant, the municipality has up to one year to contract with the office to prepare a comprehensive plan or implementation program in which case the municipality's ordinances will be subject to paragraph D.”

2. To which types of ordinances does the law apply?

The law only applies to rate of growth, impact fee, and zoning ordinances. A Rate of Growth ordinance, also known as a building cap or growth cap, is defined in state statute as a land use ordinance or other rule that limits the number of building or development permits issued by a municipality or other jurisdiction over a designated time frame. An Impact Fee ordinance establishes the applicability, formula and means by which impact fees are assessed locally. Zoning ordinances are defined in law as a type of land use ordinance that divides a municipality into districts and that prescribes and reasonably applies different regulations in each district. Some towns in Maine have different names for their zoning ordinances, for example “Land Use Ordinances.” All zoning ordinances are subject to the law except for mandatory shoreland

zoning ordinances that do not go beyond the state minimum designated shoreland zone. The 2003 deadline does not affect other local ordinances. (See also question 9)

3. Under what circumstances will my town's ordinances continue to be valid?

Local ordinances continue to be valid if the town has a “comprehensive plan adopted under the subchapter” and the challenged ordinance (or portion thereof) is consistent with the plan. Both requirements must be met. (See also questions 4 and 7)

4. What do you mean, “a comprehensive plan adopted under this subchapter?”

The subchapter referred to in the law is the Planning and Land Use Regulation Act (“Act”). “Adopted under this subchapter” is interpreted by SPO to be a comprehensive plan that is consistent with the Act in that it has been created and adopted using the process described in the Act, and includes the required elements and addresses the goals and policies described in the Act. (See also the Comprehensive Plan Review Criteria Rule (Chapter 202).) SPO uses the terms “comprehensive plan adopted under this subchapter” and “consistent comprehensive plan” interchangeably. SPO will review a plan for consistency with the Act, upon request of the town. These findings usually take two months once the comprehensive plan has been submitted and deemed complete for review. While it is likely that a judge will defer to a finding of consistency or inconsistency by SPO, in the end, it will be a judge's decision about whether or not a town's comprehensive plan is consistent with the Act. (See also questions 5, 6, 7, and 11)

5. If my town does not have a plan that SPO has found consistent, will the local zoning, rate of growth, and impact fee ordinances be voided on January 1, 2003?

No. As a practical matter, all local ordinances will remain in effect until challenged and ruled on by a judge. Only a judge can decide if this law affects your ordinances. Before this happens, a party with “standing” (for example an upset abutter or denied developer) would have to bring suit against the town. If a town does not have a comprehensive plan that has been found consistent with the Act by SPO, the judge may conduct his/her own evaluation of the town's comprehensive plan for consistency with the Act and may find that the challenged zoning, rate of growth, and/or impact fee ordinances do not meet the requirements of the Act and are no longer in effect.

If this is a concern for you, we recommend that your town should gauge its risk of being challenged in court and consult an attorney or the Maine Municipal Association's Legal Services branch (if the town is a member). Consistency reviews by the State Planning Office take at least two months *after* the plan has been deemed complete for review. Note that the SPO finding is not the only way a comprehensive plan could be found consistent. Remember, a judge may find that your comprehensive plan, even without a consistency finding by SPO, has been “adopted under this subchapter” for purposes of this statute. (See also questions 4, 6, and 11)

6. My town's plan was found inconsistent by SPO after we adopted a zoning ordinance. What happens now?

When your plan was found inconsistent, SPO outlined the areas of inconsistency and recommendations for addressing them. We strongly recommend you work toward updating your plan to address that consistency finding. In the short-term, if SPO has found your plan

inconsistent, we suggest you consult the town's attorney for an analysis of the likelihood of challenge by an unhappy developer, angry abutter, or other party that may have "standing" in a lawsuit. A judge may find that your comprehensive plan, even with an inconsistency finding by SPO, has been "adopted under this subchapter" for purposes of this statute; or the judge may rely on SPO's finding and void your zoning, rate of growth, and/or impact fee ordinances because the underlying comprehensive plan is not consistent with the Act. (See also questions 4, 5, and 11)

7. I don't know if my ordinances are "consistent." What does that mean?

A "consistent" ordinance is one that has a foundation or basis in the town's comprehensive plan (i.e., is consistent with the plan) and is not in conflict with other state or federal laws. SPO may review land use ordinances, including zoning, rate of growth, and impact fee ordinances and issue a consistency finding upon request of a town, if staff resources permit. These findings usually take two months once the ordinances have been submitted and deemed complete for review. However, state law does not designate SPO as the only party that may find an ordinance consistent. While it is likely that a judge will defer to a finding of consistency or inconsistency by SPO, in the end, it will be a judge's decision about whether or not a challenged ordinance, or a portion of an ordinance, is consistent with a town's comprehensive plan. (See also question 8)

If your town has ordinances, but no adopted comprehensive plan, by definition they are not "consistent" – since they do not have anything to be consistent with. Nevertheless, it is up to a judge to determine that an ordinance or a portion of an ordinance is "no longer in effect." (See also questions 4 and 8)

8. If the ordinance in question is not consistent with a consistent plan, is the whole ordinance thrown out?

No. First of all, as a practical matter *all* local ordinances will remain in effect until challenged and ruled on by a judge. Only those *portions* of the ordinances that may be challenged as being inconsistent with a consistent comprehensive plan are vulnerable - the remainder of the ordinance stays in effect. Only a judge can determine that an ordinance or a portion of an ordinance is "no longer in effect"- and a judge will only address this issue if a party with standing (e.g., a party that has been directly affected by the ordinance in question, for example an upset abutter or denied developer) brings suit against the town. (See also questions 4, 7, and 11)

9. My town doesn't have zoning (other than mandatory shoreland zoning), rate of growth, or impact fees ordinances - does the January 1, 2003 deadline affect my town's other ordinances?

The law only affects zoning, rate of growth, and impact fee ordinances. *However*, your town may have ordinances in place that, while not called "zoning" ordinances, meet the state's definition of a zoning ordinance. Ordinances such as historic preservation districts that clearly include a mapped district are likely to be interpreted by a judge as being a zoning ordinance. Other ordinances that may be interpreted as zoning ordinances by a judge include (but are not limited to) wetlands ordinances, which regulate certain areas based on their physical characteristics, or telecommunications tower ordinances, which limit the location of towers based on attributes of the land. Shoreland zoning ordinances that do not extend the state minimum designated shoreland zone are not at risk from this law; they do not need to be consistent with a

comprehensive plan. However, if the town's shoreland zoning ordinance has extended the boundaries of the shoreland zone, those portions that go beyond the state's model must be consistent with a consistent comprehensive plan. Consult a land use attorney to discuss the relative risk faced by these other types of zoning ordinances. (See also questions 7, 8, and 11)

10. Are there any extensions to the January 1, 2003 deadline?

Yes. There are three possible extensions of the January 1, 2003 deadline for towns meeting certain conditions:

1. If a municipality is under contract with the State Planning Office to prepare a comprehensive plan or implementation program, the deadline is extended for up to four years after receipt of the first installment of its first planning assistance grant or for up to two years after receiving its first installment of its first implementation assistance grant, whichever is earlier. (Note: for towns undertaking a comprehensive plan update, current ordinances must be consistent with your existing comprehensive plan until you adopt that updated plan, after which provision #2 below holds);
2. If the municipality has a newly adopted consistent plan or amendment, the deadline is extended for up to 24 months following adoption of the comprehensive plan or amendment.
3. If the municipality applied for and was denied financial assistance for its first planning or implementation grant due to lack of state funds on or before January 1, 2003, the deadline is extended indefinitely until the municipality is offered and rejects or receives a grant, at which point it becomes subject to the deadline described in #1 above.

11. What is the best course of action if my town attorney believes that my town's zoning (other than mandatory shoreland zoning), rate of growth or impact fee ordinances are in danger of being declared invalid by a court, either because my town's comprehensive plan is inconsistent with the Act or because the ordinances are inconsistent with my town's consistent plan?

If a municipality has the types of ordinances subject to this law, and knows it does not have a consistent comprehensive plan, it should immediately begin efforts to create a comprehensive plan or update the existing plan.

If a municipality does not have a comprehensive plan that has been reviewed by SPO, it should consult with its regional council or SPO regarding the requirements for consistency and consider submitting its comprehensive plan to SPO for a consistency finding. If specific portions of the plan are found to be inconsistent by SPO, the plan should be amended to achieve consistency and obtain a follow-up affirmative SPO finding.

A municipality that has obtained an SPO finding of consistency for its comprehensive plan should take the next step of submitting its zoning, rate of growth and impact fee ordinances (if applicable) to SPO for a consistency finding. If specific portions of the ordinances are found to be inconsistent by SPO, the ordinances should be amended to achieve consistency and a follow-up affirmative SPO finding obtained.

Summary

The law can be applied to zoning (except mandatory shoreland zoning), rate of growth, or impact ordinances in two ways:

SCENARIO 1: If a municipality does not have a consistent comprehensive plan, all such ordinances are subject to being declared invalid by a court after the applicable deadline (January 1, 2003 or later if an extension applies).

A municipality clearly does *not* have a consistent comprehensive plan if:

- it has no plan;
- the plan was adopted prior to the Comprehensive Planning and Land Use Regulation Act (1989); or
- a court has declared the plan inconsistent.

A municipality clearly *has* a consistent plan if it has been declared consistent by a court.

A good argument can be made that a plan is consistent or inconsistent if SPO has reviewed and made a finding. An SPO finding is not conclusive, but we believe that a court will tend to defer to SPO's finding.

It is unknown what a court would do if it finds a plan partially consistent and the challenged ordinance is consistent with a consistent portion of the plan.

SCENARIO 2: If a municipality has a consistent comprehensive plan, any portion of an ordinance that is inconsistent with the plan is subject to being declared invalid by a court after the applicable deadline (January 1, 2003 or later if an extension applies).

A municipality clearly has an inconsistent ordinance (or portion thereof) if it has been declared inconsistent with the municipality's consistent comprehensive plan by a court.

A good argument can be made that the ordinance (or portion thereof) is consistent or inconsistent if SPO has reviewed it and made a finding. An SPO finding is not conclusive, but we believe that a court will tend to defer to SPO's finding.